Supreme Court, U. S.
FILED
NOV 6 1975
MICHAEL RODAK, JR., CLERK

No. 75-151

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES W. GREENLEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of willful failure to file federal income tax returns for the years 1970 and 1971, in violation of 26 U.S.C. 7203. The district court fined him $5,000 on each of the two counts and placed him on probation for three years (Pet. App. B, pp. A30-A31). The court of appeals affirmed (Pet. App. A).

The evidence may be summarized as follows: Petitioner, an attorney, received sufficient income in 1970 and 1971 from the Redevelopment Authority of the City of Philadelphia to require the filing of federal income tax returns. After various officials of the Internal Revenue Service testified as to the procedures for handling tax returns and the operation of the Service's data process-

ing system (R. 389a *et seq.*, 479a *et seq.*),[1] the government introduced into evidence a computer-printed "Transcript of Account" (Gov't Ex. 7) and a manually-prepared "Certificate of Assessments and Payments" (Gov't Ex. 6). Both of these documents reflected that the Internal Revenue Service had no record that petitioner had filed a tax return for the year 1970. The Transcript of Account also reflected the fact that although the filing date for petitioner's 1971 tax return had been extended to May 19, 1972, the Service had not received his return for that year until January 2, 1973. The government also introduced in evidence a one-page excerpt from a list of names of persons, which included petitioner, to whom notices of delinquency in the filing of returns for the year 1970 were sent in April 1972. Moreover, an Internal Revenue Service employee testified that on September 12, 1972, a notice (Gov't Ex. 11) was sent to petitioner informing him that the Service had no record that he had filed his 1971 return.

The evidence also established that on December 26, 1972, petitioner met with an Internal Revenue Service agent, who confronted him with the fact that the Service had no record that he filed returns for either 1970 or 1971. Petitioner told the agent that he had filed his return for 1970 in a timely fashion (R. 537a) and that he had mailed his return for the year 1971 during the week prior to the interview (R. 538a, 579a). The next day, petitioner delivered to the agent copies of what purported to be his tax returns for the years 1970 and 1971 (Gov't Exs. 14, 15). These copies bore information substantially corresponding to the figures which petitioner had recited to the agent on the previous day (Pet. App. A, p. A3).

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[1] "R." refers to the record appendix filed in the court of appeals.

Petitioner testified that he mailed his 1970 return on the night of April 15, 1971 (R. 837a) and that he mailed his 1971 return at his office on December 24, 1972. He further stated that, despite the fact that he received a notice from the Service in September 1972 that his 1971 return had not been received, he did not file that return until December 1972 because his return for that year was more complicated than usual (R. 852a) and because of his involvement during that year in an investigation of the Redevelopment Authority (R. 853a-854a). On cross-examination, petitioner admitted that he filed a City of Philadelphia "Combined Business Tax Return" (Gov't Ex. 21) for the year 1970 in April 1972 (R. 1016a), and that the amounts claimed for business expenses on his city return were less than those claimed for the identical expenses on the alleged federal return for 1970 (R. 1027a-1028a). This city return was thereupon admitted in evidence (R. 1124a).

Petitioner also presented a witness whose name appeared directly below that of petitioner's on the list of persons to whom the Service purportedly sent notices of nonfiling for 1970. This witness testified that his return for 1970 had been timely filed and a refund paid to him, and that he had never received a notice that the Service had no record of a return for him for 1970 (see R. 754a *et seq.*). A computer expert testified on behalf of petitioner concerning possible areas of error in both the input and retrieval aspects of the Internal Revenue Service's data processing system (R. 763a *et seq.*).

1. Petitioner first argues (Pet. 15-17) that the trial court's instruction on the element of willfulness was erroneous. The court instructed the jury as follows (R. 1203a):

> The word "willful" as used in these statutes means voluntary. It means purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligence. Mere negligence, even gross negligence, is not sufficient to establish willfulness. An act is done willfully if done knowingly and with a specific intent to do something that the law forbids, that is to say, with a bad purpose, either to disobey or disregard the law.
>
> The only bad purpose or bad motive necessary for the Government to prove in this case, however, is the deliberate intention not to file returns which the defendant knew ought to be filed.

In *United States* v. *Bishop*, 412 U.S. 346, this Court held that the word "willful" in the criminal tax statutes "connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). The instruction here is in complete accord with the *Bishop* definition of "willful." Nothing in *Bishop* requires that the trial court employ any particular words in its instructions to the jury on willfulness. The reference in *Bishop* (412 U.S. at 361) to "the bad purpose or evil motive described in *Murdock*" (*United States* v. *Murdock*, 290 U.S. 389) does not impose such a requirement. While the Court in *Murdock* formulated the requirement of willfulness in terms of "bad faith or evil intent" (290 U.S. at 398), that case does not require that the trial court employ those precise words in its instructions to the jury. As the Court pointed out in *Bishop* (412 U.S. at 360), the *Murdock* definition of willfulness is synonymous with the "voluntary, intentional violation of a known legal duty" standard. Both formulations are designed to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers" (412 U.S. at 361). See also *United States* v. *McCorkle*, 511 F.2d 482 (C.A. 7) *(en banc)*, certiorari denied October 6, 1975, No. 74-1371; *Cooley* v. *United States*, 501 F.2d 1249 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *Hawk*, 497 F.2d 365 (C.A. 9), certiorari denied, 419 U.S. 838. None of the cases relied upon by petitioner (Pet. 16 n. 2, 17)[2] require that the phrases "bad purpose" or "evil motive" be included in every instruction to the jury on willfulness. See *United States* v. *Pohlman*, C.A. 8, No. 74-1759, decided August 27, 1975 (*en banc*), pending on petition for a writ of certiorari, No. 75-483.

Petitioner further suggests (Pet. 16-17) that use of the terms "bad purpose" and "evil motive" by this Court indicates that the government must establish that petitioner acted with some purpose to conceal his tax liability from the government in order to prove a willful failure to file. There is, however, no such requirement. A conviction for failure to file under 26 U.S.C. 7203 requires proof only that the defendant was aware of his duty to file a tax return and voluntarily and intentionally did not do so at the time required by law. See, *e.g.*, *United States* v. *McCorkle*, *supra*, 511 F.2d at 485; *United States* v. *Lachmann*, 469 F.2d 1043, 1045 (C.A. 1), certiorari denied, 411 U.S. 931; *United States* v. *Ming*, 466 F.2d 1000, 1005 (C.A. 7), certiorari denied, 409 U.S. 915. The motive for failing to meet his legal obligation is irrelevant. *United States* v. *Malinowski*, 472 F.2d 850 (C.A. 3), certiorari denied, 411 U.S. 970.

2. Petitioner also argues (Pet. 15-17) that there was a total absence of evidence that he acted willfully. Petitioner was an attorney with a substantial income during

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[2] *United States* v. *Snider*, 502 F.2d 645 (C.A. 4); *United States* v. *Bengimina*, 499 F.2d 117 (C.A. 8); *United States* v. *Vitiello*, 363 F.2d 240 (C.A. 3).

the years at issue and had filed returns for the years prior to 1970 (Gov't Exs. 6, 7). The testimony of Special Agent Patella established that petitioner was aware of his obligation to file timely tax returns. The evidence also established that defendant did not file a tax return for 1970, did not mail his 1971 tax return until after a meeting with Agent Patella on December 26, 1972, and misrepresented prior to and during the trial both the fact of filing the 1970 return and the time of filing the 1971 return. From this evidence, the jury was amply justified in concluding that petitioner had voluntarily and intentionally failed to file tax returns which he knew he was required to file. See, *e.g.*, *United States* v. *O'Connor,* 433 F.2d 752, 754 (C.A. 1), certiorari denied, 401 U.S. 911; *Lumetta* v. *United States,* 362 F.2d 644, 645-646 (C.A. 8); *United States* v. *Cirillo,* 251 F.2d 638, 639 (C.A. 3), certiorari denied, 356 U.S. 949.

3. Petitioner further argues (Pet. 18-21) that the record-keeping system of the Internal Revenue Service is not sufficiently reliable to permit a finding of nonfiling to be based solely on the negative evidence that his returns were not found. The evidence (Gov't Exs. 6, 7) that reflected that there was no record that petitioner filed his 1970 return was admitted pursuant to the Federal Business Records Act, 28 U.S.C. 1732 (Pet. App. B, p. A16). That Act permits the use in evidence of records "made as a memorandum or record of any act, transaction, occurrence, or event, *** as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter." The Federal Business Records Act has been

held applicable to computer printouts (*United States* v. *Russo*, 480 F.2d 1228, 1240 (C.A. 6), certiorari denied, 414 U.S. 1157) and to permit admission of computer printout sheets as evidence of the lack of a particular transaction (*United States* v. *DeGeorgia*, 420 F.2d 889, 891-894 (C.A. 9)).

Here, the government presented evidence that tax returns were regularly processed through the Internal Revenue Service's electronic data processing system and that entries were made in the regular course of business. The procedures for handling returns, entering information, and preparing transcripts of assessments and payments were also fully explained. Although petitioner attempted to demonstrate discrepancies in the government's exhibits, his evidence did not diminish their status as regularly kept official records and therefore did not affect their admissibility but went only to the weight to be given to them by the jury. *United States* v. *Newman,* 468 F.2d 791, 796 (C.A. 5), certiorari deneied, 411 U.S. 905; *United States* v. *Re*, 336 F.2d 306, 313 (C.A. 2), certiorari denied, 379 U.S. 904. Thus, the court of appeals correctly concluded (Pet. App. A, p. A5) "that the government's evidence that the IRS had no record of a return, when evaluated in light of the evidence as to the record-keeping procedures of the Service," was sufficient to permit the jury to conclude that petitioner did not file his 1970 tax return.

4. The trial court instructed the jury that the mere possibility that petitioner's 1970 return did not arrive at the Service Center or was not recorded on the computer was insufficient to raise a reasonable doubt that petitioner failed to file it (see R. 1207a-1209a; Pet. 22-23, n. 3). Petitioner contends (Pet. 21-24) that the effect of this instruction was to shift the burden of proof and to relieve

the prosecution of its burden of proving guilt beyond a reasonable doubt. But the trial court repeatedly advised the jury that the government bore the burden of establishing guilt beyond a reasonable doubt (R. 1207a-1209a). As the court of appeals correctly recognized (Pet. App. A, p. A8), the instruction did not shift the burden of proof, but simply advised the jury that the government was only required to prove petitioner's guilt beyond a reasonable doubt and was not required to prove that there was no possibility whatsoever that petitioner's return was not received or recorded.

5. Petitioner further contends (Pet. 24-28) that the government withheld from the defense information that should have been disclosed under *Brady* v. *Maryland*, 373 U.S. 83. This claim relates to a list of names of persons whom the Internal Revenue Service believed had not filed tax returns for the year 1970 and to whom notices allegedly had been sent advising that no return had been received and requesting an explanation. In petitioner's view, he could have used this list to locate witnesses who would testify that they had filed returns for 1970 despite the fact that their names appeared on the list, thereby impeaching the reliability of the data processing system.[3] But even assuming this list was *Brady* material (see Pet. App. A, p. A11), petitioner made no request for this information (Pet. App. A, p. A10) as required by *Brady*. See *Brady* v. *Maryland*, *supra*, 373 U.S. at 87. See also *Moore* v. *Illinois*, 408 U.S. 786, 794-795.[4]

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[3]The question whether the entire list is subject to discovery by the defendant is presented in *Liebert* v. *United States*, petition for a writ of certiorari pending, No. 75-157.

[4]Moreover, petitioner did not object to the government's use of this evidence, and he was even able to find a witness whose name appeared on the list who testified that he in fact filed his 1970 tax return (Pet. App. A, p. A10). Petitioner thereby argued in his closing statement to the jury that the Service's records were inaccurate because of the error on this one-page excerpt.

6. Finally, there is no merit to petitioner's contention (Pet. 28-30) that the government improperly obtained a copy of petitioner's city tax return for the year 1970. The return was produced by the Revenue Commission of the City of Philadelphia pursuant to a court order (Pet. 29, n. 8) that the return be supplied to the federal grand jury. The order did not limit the use to which the return would be put, and petitioner cannot now complain that the grand jury turned this return over to the prosecution after indicting him for failing to file his federal tax returns. At all events, even if the use of the city return[5] could not properly rest upon the grand jury subpoena and court order, a trial subpoena could have been issued for its production under Rule 17(c) of the

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[5]The return was properly used to impeach petitioner's testimony by demonstrating that despite his claim that he did not have time during 1972 to file his 1971 federal tax return until December 1972, he nevertheless found time to file his 1970 city tax return in April 1972 (Pet. App. A, pp. A8-A9). The return was also used to demonstrate that although petitioner claimed that he had filed his 1970 federal tax return, the 1970 federal return must not have been prepared at the time petitioner filed his 1970 city return in April 1972, since business expense deductions claimed on his city returns were less than those claimed for identical expenses on the alleged copy of the 1970 federal return produced in December 1972 (Pet. App. A, p. A9).

Federal Rules of Criminal Procedure. Petitioner could not have raised any defense that would have then barred the production of the city return.[6]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[6]Petitioner complains (Pet. 29-30) that he had no opportunity to object to the initial production of his city tax returns. But the local ordinance which permits production specifically provides for production pursuant to court order (see Pet. 28). Petitioner thus cannot reasonably assert an expectation of privacy or confidentiality in these returns insofar as a court order is concerned. See *Couch* v. *United States*, 409 U.S. 322, 335-336.